confront competition in the local telephone service market — and have sought to support those contentions with "head counts" of purported "competitors" — at bottom there has never been any demonstration that BOCs are *not* able "to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable " To the contrary, while feigning competitive pressures, BOCs have frequently *raised their prices* when given the "pricing flexibility" to do so, and have almost never responded to CLEC pricing initiatives by dropping their rates in areas in which CLECs have achieved some actual presence Hence, there is no basis for the Commission to find that there has been *any* consequential diminution of BOC market power in the local services market since the date of enactment of the 1996 law.

15 The requirements that a market is *open* to competition, the standard applied by the FCC when considering BOC section 271 applications, teaches nothing about the BOC's retention of market power in that local market Without viable, readily available customer choice among local service providers, no theoretical ability of a competitor to enter the market will meaningfully restrict a BOC's incentive or ability to raise local prices above competitive levels. Indeed, this Commission specifically anticipated that a BOC would retain and be able to exercise local market power even after grant of authority to provide in-region interLATA services

> Although we are classifying these carriers as non-dominant with respect to their provision of in-region and out-of-region long distance services, as summarized above, we recognize that, *as long as these carriers retain market power in providing local exchange and exchange access services, they will have some*

> *incentive and ability to misallocate costs to local exchange and exchange access services, to discriminate against their long distance competitors, and to engage in other anticompetitive conduct*[18]

To the best of my knowledge, the Commission has *never* determined, with respect to any of its Section 271 rulings, that the BOC under inquiry no longer had market power or would be incapable of "misallocat[ing] costs to local exchange and exchange access services, [of] discriminat[ing] against their long distance competitors, and [of] engag[ing] in other anticompetitive conduct"

16. The Commission's chosen solution to the potential for anticompetitive conduct stemming from BOC market power was, *inter alia*, the application of Section 272:

> In light of the requirements established by, and pursuant to, sections 271 and 272, together with other existing Commission rules, we conclude that the BOCs will not be able to use, or leverage, their market power in the local exchange or exchange access markets to such an extent that their section 272 interLATA affiliates could profitably raise and sustain prices of in-region, interstate, domestic, interLATA services significantly above competitive levels by restricting the affiliate's own output[19]

This linkage between "sections 271 and 272, together with other existing Commission rules" and the BOCs' ability "to use, or leverage, their market power in the local exchange or exchange access markets to such an extent that their section 272 interLATA affiliates could profitably raise and sustain prices of in-region, interstate, domestic, interLATA services

18. *LEC Interexchange Non-Dominant Order*, 15764-15765, emphasis supplied.

19 *Id* at 15763

significantly above competitive levels by restricting the affiliate's own output" is no less valid today and for the foreseeable future than it was in 1997 when this determination was made. Put differently, were the Commission to permit the Section 272 separate affiliate requirement and its associated 272(b) code of conduct to expire, there is little doubt that the BOCs *would* "be able to use, or leverage, their market power in the local exchange or exchange access markets to such an extent that their section 272 interLATA affiliates could profitably raise and sustain prices of in-region, interstate, domestic, interLATA services significantly above competitive levels by restricting the affiliate's own output"

17 The BOCs' local market power has not diminished since 1997. When considering the bundling of services in March 2001, the Commission again found that BOCs retain market power in the local exchange market, and again based its policy upon the conclusion that Section 272 provided a check on the ability of a BOC to leverage its local market power into adjacent markets

> Despite the inroads made by competitors into the local exchange market that we described above, incumbent LECs retain market power in the provision of local service within their respective territories. Thus, unlike our previous analysis of the interexchange market or nondominant LECs, incumbent LECs possess one of the essential characteristics for engaging in anticompetitive behavior — market power with respect to one of the components in the bundle Nonetheless, we conclude, in light of the existing circumstances in these markets, that the risk of anticompetitive behavior by the incumbent LECs in bundling CPE and local exchange service is low and is outweighed by the consumer benefits of allowing such bundling We view the risk as low not only because of the economic difficulty that even dominant carriers face in attempting to link forcibly the

> purchase of one component to another, *but also because of the safeguards that currently exist to protect against this behavior* [20]

18 As recently as July 15 of this year, FCC Chairman Michael Powell was quoted in *The Wall Street Journal* reiterating the conclusion that BOCs have been slow to lose their market power in the local market "We correctly believed these markets didn't need to be natural monopolies and they could be competitive, but I think we tended to over-exaggerate how quickly and how dramatically it could become competitive."[21]

19 The FCC is not alone in remaining concerned about BOC local market power and its potential anticompetitive effects The New York PSC has recently found that Verizon New York remains dominant in the special services (i.e UNEs and special access) market:

> Verizon's data, as well as the advantages attendant upon its historical incumbent position, indicate it continues to occupy the dominant position in the Special Services market, and by its dominance is a controlling factor in the market. Because competitors rely on Verizon's facilities, particularly its local loops, Verizon represents a bottleneck to the development of a healthy, competitive market for Special Services In this situation, regulation is needed to assure the development of competitive choices, and good service quality when choices are not available. Accordingly, we find that a competitive facilities-based market for

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20 *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No 96-61, *1998 Biennial Regulatory Review — Review of Customer Premises Equipment And Enhanced Services Unbundling Rules In the Interexchange, Exchange Access And Local Exchange Markets*, CC Docket No 98-183, *Report and Order*, Rel March 30, 2001, 16 FCC Rcd 7418, 7438, emphasis supplied At 16 FCC Rcd 7434, the Commission specifically notes Section 272, *inter alia*, as providing sufficient protection against the market power of the BOCs.

21 "FCC's Powell Says Telecom 'Crisis' May Allow a Bell to Buy WorldCom," *The Wall Street Journal*, July 15, 2002, at A1, A4

> Special Services has yet to emerge and that Verizon continues to dominate the market overall[22]

CLECs and IXCs depend heavily upon BOC special services in order to furnish retail local and long distance services to their own customers By virtue of their control over these bottleneck facilities, BOCs are in a position to restrict the availability of these essential services to their rivals. If the special services market were competitive, the creation of artificial limitations on service availability would not be possible.

20 In a Draft Decision released July 23, 2002 in the current Pacific Bell Section 271 consultative proceeding in California, the presiding Administrative Law Judge, while on the one hand finding that Pacific Bell had satisfied 12 out of the 14 checklist items and on that basis recommending that the California Commission so advise the FCC, nevertheless observed that

> Local telephone competition in California exists in the technical and quantitative data, but it has yet to find its way into the residences of the majority of California's ratepayers Only time and regulatory vigilance will determine if it ever arrives We expect that the public interest will be positively served in California by the addition of another experienced, formidable competitor in the intrastate interexchange market At the same time, we foresee the harm to the public interest if actual competition in California maintains its current anemic

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22. *Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc.*, Case 00-C-2051, *Proceeding on Motion of the Commission to Investigate Performance-Based Incentive Regulatory Plans for New York Telephone Company*, Case 92-C-0665, before the New York Public Service Commission, *Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc , Conforming Tariff, and Requiring Additional Performance Reporting*, June 15, 2001, at 9

> pace, and Pacific gains intrastate long distance dominance to match its local influence [23]

Other state commissions have similarly found that ILECs retain substantial market power with respect to local and access services The Indiana Utility Regulatory Commission recently concluded

> However, we cannot ignore the potential negative consequences or anti-competitive effects that could flow from an unrestricted grant of authority to an affiliate of the largest ILEC in Indiana The conditions that are ordinarily imposed on facilities-based carriers are only a starting point as those conditions were designed primarily for CLECs This docket involves certification of an affiliate of the largest ILEC in the state This Cause also involves an affiliate intending to use advanced technology and investment in the public network for the provision of advanced services Ameritech Indiana as the dominant local exchange provider has the incentive and capability to exercise market power.[24]

The Montana PUC echoed Indiana's concern.

> The Commission is sympathetic to the concerns expressed by the parties and recognizes that the competitive local exchange market will likely create opportunities for customers to obtain services from alternate providers even though they may have delinquent accounts with a competitor This will be a change for the incumbent LEC which has been the only provider of telecom-

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23 Calif PUC, *Draft ALJ Decision Granting Pacific Bell Telephone Company's Renewed Motion for an Order that it has Substantially Satisfied the Requirements of the 14-point Checklist in § 271 of the Telecommunications Act of 1996 and Denying that it has Satisfied § 709 2 Of the Public Utilities Code*, R 93-04-003 *et seq.*, released July 23, 2002 ("*California PUC Draft 271 Decision*").

24. *In the Matter of the Petition of Ameritech Advanced Data Services of Indiana, Inc (Which Is In the Process of Adopting the Business Name of SBC Advanced Solutions, Inc) For A Certificate of Territorial Authority to Provide Facilities-based and Resold Telecommunications Services Throughout the State of Indiana and Requesting the Commission to Decline to Exercise Jurisdiction Pursuant to I C. 8-1-2.6*, Indiana Utility Regulatory Commission Cause No 41660, *Opinion*, 2001 Ind. PUC LEXIS 275, approved May 19, 2001, at *39-*40

munications service in the past and which still has near total market power, particularly in rural states like Montana[25]

21. Raw data purporting to quantify the extent of CLEC market penetration that has been offered by BOCs in various Section 271 proceedings is, at a minimum, highly controversial[26] and, consistent with the California ALJ's finding, does not establish that competition exists "on the ground" at a level that offers consumers a realistic alternative to the BOC's services or that works to limit or constrain the BOC's market power

22 The FCC Industry Analysis and Technology Division's latest figures for local competition also belie any claims by BOCs that they have lost market power As of December 2001, CLECs nationally had only a 10% local market share, and some 38% of US zip codes lacked even a single competitive local provider.[27] Despite BOC claims that their

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25. *In the Matter of the Application of Citizens Telecommunications Company of Montana and CommSouth Companies, Inc , Pursuant to Section 252(e) of the Telecommunications Act of 1996 for Approval of Their Resale Agreement*, Montana Public Service Commission, Utility Division Docket No D2000 7.104; Order No 6281, *Final Order*, Montana Public Service Commission, 2000 Mont PUC LEXIS 121, October 16, 2000, at 13.

26 In seeking to quantify the extent of CLEC market presence, BOCs have relied upon CLEC E911 database entries adjusted to exclude UNE-Loops, as indicative of the number of CLEC facilities-based lines But E911 database records are keyed to *telephone numbers*, not telephone *lines*, and in the case of multiline business customers the quantity of individual telephone numbers may be a multiple of the number of individual lines. In addition, BOCs have typically not excluded from the E911 "number counts" non-UNE BOC facilities that are being leased to CLECs such as and including Special Access lines. In fact, since CLECs are frequently unable to utilize UNE-loops to serve multiline business customers, the quantity of BOC Special Access facilities being leased by CLECs likely represents a substantial fraction — possibly even the *majority* — of CLEC-provided retail lines

27. FCC Industry Analysis and Technology Division, *Local Telephone Competition: Status as of December 2001*, Rel July 23, 2002, ("*Local Competition Report*"), at Tables 6 and 14.

entry into the interLATA market is the catalyst that will stimulate CLEC entry, the "facts on the ground" do not come even remotely close to supporting that contention. For one thing, even for those states in which CLEC retail penetration is highest, the penetration of *facilities-based* competitive services is minimal. According to FCC data, for the sixteen states in which in-region long distance entry has been permitted (which include fourteen BOC states that have attained Section 271 authority plus Connecticut and Hawaii, where no such authority was required), BOCs (and, in the case of Connecticut and Hawaii, non-BOC ILECs) provide the underlying facilities for roughly 97.4% of all residential lines (see Table 2).

23. New York, the most frequently cited example of "robust" local competition, is still struggling with BOC local market power. A report including an analysis of local competition presented recently by the staff of the New York Public Service Commission (NYPSC) indicates that CLEC penetration rates in New York actually *decreased* in the second quarter of 2001, suggesting that the initial CLEC gains following Verizon's interLATA entry could not be sustained.[28] The NYPSC staff attributes this drop to poor performance in the CLEC capital market, to UNE pricing problems, and to a myriad of small obstacles placed by Verizon on CLEC competitors attempting to interconnect or secure facilities from the BOC.[29] The NYPSC recently issued an order significantly reducing UNE rates,[30] and it is my understanding that CLEC activity has increased as a result. And that is the point. CLECs

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28 New York Public Service Commission, *In the Matter of Verizon– New York*, Case No. 00- C- 1945, Report of Commission Staff, February 2002, at 18-19.

29 *Id.*

30 *Proceeding on Motion of the Commission to Consider Cost Recovery by Verizon and to Investigate the Future Regulatory Framework*, NYPSC Case 00-C-1945, *Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*, NYPSC Case 98-C-1357, *Order Instituting Verizon Incentive Plan*, New York Public Service Commission, February 27, 2002.

Table 2

CLEC Facilities-Based Residential Penetration

for States with BOC or ILEC In-Region InterLATA Authority

State	CLEC Residential Retail Market Share	Percent of CLEC Lines that are Facilities-based	CLEC Residential Facilities-based Market Share
Connecticut	3 87%	48 73%	1 88%
Hawaii	0.00%	0 00%	0 00%
New York	22 48%	20.33%	4 57%
Texas	11 27%	19 13%	2 16%
Kansas	7 02%	17 00%	1 19%
Oklahoma	4 28%	55 66%	2 38%
Massachusetts	10 59%	47.44%	5 02%
Pennsylvania	9 93%	43 15%	4.28%
Arkansas	0 00%	0 00%	0 00%
Missouri	3 84%	14 03%	0 54%
Rhode Island	13 48%	56 93%	7 68%
Vermont*	0 23%	0 00%	0 00%
Georgia	7 62%	27.91%	2 13%
Louisiana	0.52%	23.09%	0 12%
Maine	0 00%	0.00%	0 00%
New Jersey	1 55%	21 50%	0 33%
Weighted Average	9 87%		2 59%

Source FCC, Wireline competition Bureau, Industry Analysis and Technology Division, *Local Competition Report*, Rel July 23, 2002, at Tables 6, 8, and 9 Averages are weighted by total residential lines States designated by IATD with CLEC penetration levels too small to maintain firm confidentiality are included as 0% Facilities-based percentage is for total CLEC lines, however, since CLECs more commonly serve residential lines via UNE or resale arrangements, the CLEC facilities-based residential share figures likely overstate actual CLEC facilities-based residential shares Data for Vermont is taken from Application by Verizon New England, Inc , et al, for Authorization To Provide In-Region, InterLata Services in Vermont, WC Docket No 02-7, Verizon Brief, filed January 17, 2002, at 7 will attempt to enter and compete in the local market when they can do so profitably, not because the ILEC is or is not in the long distance business

24 In fact, any CLEC competition that does exist is holding on by a thread. Last August (2001), CLEC analysts at Morgan Stanley Dean Witter noted that the market capitalization of CLECs as a group had fallen by 65.8% since January 1, 2001.[31] By July 22 of this year, the cumulative decrease in CLEC values since November 2001 had escalated to 40%[32] As *The Economist* recently observed

> The telecoms bust is some ten times bigger than the better known dotcom crash. the rise and fall of telecoms may indeed qualify as the largest bubble in history. Telecoms firms have run up total debts of around $1 trillion. And as if this were not enough, the industry has also disgraced itself by using fraudulent accounting tricks in an attempt to conceal the scale of the disaster.[33]

The Economist goes on to note that "[t]he likely winners, it is already clear, are the former "Baby Bells" in America and the former monopoly incumbents in Europe."[34] The cratering of CLEC share prices indicate that (1) investors have less confidence in these companies'

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31. Morgan Stanley Dean Witter, Equity Research North America, Industry. Competitive Local Exchange Carriers (CLECs), August 14, 2001, at 1, provided in Attachment 10 In an earlier report issued by MSDW, its analysts indicated that "[u]nlike the last two CLEC market corrections, we do not believe that the current one is likely to end with the entire group rocketing back because, over the next six months, we expect news headlines to be peppered with reports of additional bankruptcies" Morgan Stanley Dean Witter, Equity Research: North America, Industry Competitive Local Exchange Carriers (CLECs), November 7, 2000, at 2

32 "Telecoms Adrift In Market Turmoil, TR Daily Telecom Index Plunges 4 6%", *Telecommunications Reports Daily*, July 22, 2002.

33 "The great telecoms crash," *The Economist*, July 20, 2000, at 9.

34 *Id*

ability to succeed with business plans premised upon competing with ILECs, and (2) the companies themselves now will have much more difficulty attracting capital with which to pursue any future business plans A facilities-based CLEC requires a substantial amount of up-front investment, and a lack of capital with which to pursue market entry will effectively block most such efforts CLECs — particularly those still in business today — also require recurring infusions of capital to cover losses extant during the initial ramp-up phase of their operations, and the lack of such capital could well force what might otherwise have ultimately been a successful venture into Chapter 11 (as it did for NorthPoint, Covad, Rhythms, HarvardNet, Global Crossing and McLeod, to name a few). In fact, industry officials and financial analysts indicate that they do not expect the capital markets to open up anytime soon for most cash-starved CLECs, which is likely to force more CLECs to sell assets or go into bankruptcy And those CLECs still in business, that BOCs claim as "competitors," hardly pose a serious or formidable competitive challenge at a level that would materially work to constrain a BOC's exercise of market power.

25. Even with the recent reduction in New York UNE rates, and even considering some of the recent CLEC successes there, Verizon New York retains significant local market power in much of the state In fact, the area of New York State with the most CLEC activity, as measured by the percentage of total lines served by CLECs, is Rochester — an area *not even being served by Verizon New York* In addition, the Poughkeepsie LATA, at year end 2000, showed only a 5% CLEC penetration rate [35] While the statewide CLEC penetration rate in New York hovers in the low 20% range, New York State continues to have areas with little

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35 New York Public Service Commission, *Analysis of Local Exchange Service Competition In New York*, Data as of December 31, 2000 (Available at http //dps state ny us/telecom/telanalysis.htm)

or no CLEC presence[36] Where Verizon New York is the ILEC in these regions, the BOC not only retains market power, it in fact remains a monopoly Until conditions across the state indicate that Verizon New York has lost its local market power, removing the Section 272 safeguards would disproportionately impact those consumers in areas with little or no competition

26 Over the next year and a half, four states — New York, Texas, Kansas and Oklahoma — will reach the three-year sunset point According to the FCC's most recent *Local Competition Report*,[37] CLECs in Kansas serve only 9% of the local market, while the CLEC share in Oklahoma is an even more dismal 8% (below the national average) This figure is likely to be even smaller now, since Global Crossing, a CLEC that was active in both Kansas and Oklahoma, has filed for bankruptcy since the December 2001 time frame of the data in the *Local Competition Report*.

27. Kansas and Oklahoma, the third and fourth states to receive Section 271 authority, have seen nowhere near the amount of competitive local growth that the BOCs attempt to ascribe to "271" states More generally, a statistical examination of CLEC retail and facilities-based penetration rates as between states with and without ILEC in-region long distance authority finds no statistically significant link between in-region authority and CLEC penetration (see Attachment 2)

28. This uneven distribution of local competition in the states first receiving Section 271 authority belies any claim that the competitive local entry "spurred" by BOC long distance

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36 *Local Competition Report*, at Table 14.

37 *Id*, at Table 6

entry has eliminated BOC *local* market power. There are several even more compelling examples that confirm this conclusion. At the time of the break-up of the former Bell System, two of the "Bell System" companies — The Southern New England Telephone Company ("SNET") in Connecticut and Cincinnati Bell, Inc. in Ohio and Kentucky — were only minority-owned by AT&T and were not required to be divested or made subject to the interLATA long distance line-of-business restriction that applied to all of the other Bell Operating Companies. AT&T voluntarily divested its remaining interest in both of these companies shortly after the break-up, and both were free to enter the long distance market at any time from 1984 onward. The GTE operating companies were not subject to the Bell MFJ line-of-business restriction, but became subject to a similar prohibition against long distance entry when GTE acquired a controlling interest in Sprint. However, the 1996 *Telecommunications Act* lifted the GTE long distance ban,[38] and the GTE companies were free to — and did — enter the long distance market as of the date of enactment, i.e., February 8, 1996. SNET, in fact, entered the Connecticut long distance market in 1993,[39] some *seven years sooner* than Verizon and SBC began offering such services in New York and Texas, respectively. Following enactment of the 1996 law and adoption of implementation rules by the FCC later than year, SNET and the GTE companies, all of which are ILECs as defined at 47 U.S.C. §251(h), were required to comply with the unbundling, resale, interconnection, and nondiscriminatory access to poles, ducts, conduit, operator services, directory assistance, directory listings as well as other the requirements of Sections 251 and 252 that I have previously enumerated (see Table 1 above). These obligations are very similar to the market opening requirements of Section 271(c)(2)(B), and when complied with by the ILECs *as they*

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38 47 U.S.C. § 601(a)(2).

39 SBC Investor Briefing, *SBC Enters $7.7 Billion Texas Long-Distance Market*, July 10, 2000.

are required to do would afford competitors the same ability to enter the local market in the *non-BOC* ILEC service areas as would prevail in BOC jurisdictions once the "competitive checklist" had been satisfied.

29 SNET is the dominant ILEC in Connecticut, and GTE (now Verizon) is the *sole* ILEC in Hawaii If in fact there were any kind of *causal link* between ILEC long distance entry and the "stimulation" of local competition, one would expect to see rampant CLEC activity and market penetration in both of these states, as well as in such concentrated GTE (now Verizon) local service areas as southern California and the west coast of Florida. The facts speak otherwise Studies by the FCC and others confirm that despite these ILECs' *early* long distance entry, very little competitive *local* entry has occurred. The CLEC share in Connecticut is only about 7%, and CLEC activity is virtually nonexistent in Hawaii.[40]

30 BOC retention of market power in the local market is also illustrated by the fact that, even in the place where CLECs are the most active — New York City — the incumbent BOC (Verizon) has failed to adjust its prices in response to competitor pricing initiatives For example, Verizon New York provides basic residential service on a message-rate basis in most of New York City, with an untimed charge per local call of 10 6 cents. CLECs have introduced various new pricing regimes in an effort to differentiate their services from those of Verizon, including unlimited local calling and pricing plans that include thousands of local minutes[41] However, even with CLEC penetration of the New York City residential market

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40 *Local Competition Report*, at Table 6 Connecticut had just 8% CLEC end-user switched access lines, Hawaii's CLEC share was so small that it was not even included in the FCC report with the explanation, "data withheld to maintain confidentiality."

41 According to AT&T's website, AT&T offers a package of unlimited local minutes and

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now exceeding 20%, Verizon New York has maintained "measured-only" pricing for basic service,[42] although the Company is apparently in the process of introducing a new "package" of residential basic service and vertical features, targeted to high-end customers in New York, that includes flat-rate local and intraLATA toll calling for $54.95 per month.[43] And in February of this year, Verizon received authority from the New York PSC to *increase* its basic residential rates throughout New York State.[44] Verizon's revealed conduct confirms that it has "the ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable."

31. Finally, the extraordinary difficulties that CLECs confront when attempting to compete with a BOC or other ILEC is compelling demonstrated by the fact that the two largest BOCs -- Verizon and SBC — have themselves failed to actively pursue out-of-region local market entry (as CLECs) *even after having represented to the FCC that they would do so.* SBC, in its Joint Application for approval of its merger with Ameritech,[45] and Verizon,

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41. (...continued)
three vertical features in Manhattan for $23.90 per month. Talk America offers 5,000 local minutes, unlimited vertical features and long distance benefits to customers in Manhattan for $35.95 a month.

42. Verizon New York PSC Tariff No. 2, Second Revised page 22, eff. May 13, 2002.

43. Verizon NY PSC Tariff No. 1, Section 2, Original page 220, Original page 57, eff. July 26, 2002.

44. Verizon Press Release, "New York PSC Approves Verizon Regulatory Plan, Company Announces First Basic Rate Increase in 11 Years, Continues Commitment to Service Quality," February 27, 2002.

45. *In re Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Board Licenses and*
(continued...)

in its Joint Application for approval of its merger with GTE,[46] each represented that following their respective mergers the two mega-ILECs would each commit to pursuing "out-of-region" entry in various local exchange service markets SBC had identified thirty such markets (of which 17 were in what would become Verizon territory),[47] while BA/GTE (Verizon) committed to enter twenty-one markets [48] Although various parties and their experts, including myself, were highly skeptical as to the legitimacy of these so-called "commitments," both sets of joint applicants insisted that their respective "national local strategies" would be aggressively pursued and would result in a significant enhancement of facilities-based local competition throughout the country.[49] In its Orders approving the two mergers, the FCC undertook to put some teeth into what were in other respects "soft" commitments on the part of the two sets of merger parties with respect to their out-of-region local entry plans In its *SBC/Ameritech Order*, the Commission *required* SBC to undertake the promised out-of-region local entry, and indicated that the post-merger SBC would be fined

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45 (...continued)
Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Board's Rules, Before the Federal Communications Commission, CC Docket No. 98-141, *Application* , Filed July 27, 1998 ("SBC/Ameritech Merger Application"), at Sec. II A 1

46. *Applications of GTE Corporation and Bell Atlantic Corporation, Description of the Transaction, Public Interest Showing and Related Demonstrations*, Before the Federal Communications Commission, CC Docket No 98-184, *Application*, Declaration of Jeffrey C Kissell, Filed October 2, 1998, ("*Bell Atlantic/GTE Merger Application*"), at para 14.

47 *SBC/Ameritech Merger Application*, Attachment A "New Markets for the New SBC"

48 *Bell Atlantic/GTE Merger Application*, at para 14

49 *Id* , at para 15; *SBC/Ameritech Application*, Affidavit of James S Kahan, at para 27.

as much as $39.6-million for each of the 30 out-of-region markets that it did not enter[50] In the *BA/GTE Order*, the FCC similarly imposed the threat of fines if BA/GTE failed to invest at least $500-million in out-of-region CLEC activities, or provide service as a CLEC to at least 250,000 customer lines, by the end of 36 months following the merger closing date[51] As it has turned out, of course, the skepticism of various commenters and the concerns of the FCC with respect to the veracity of these out-of-region local entry "commitments" were well-founded Early last year, both SBC and Verizon announced that they had each abandoned or drastically scaled-back their out-of-region local entry plans[52] The decision by both SBC

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50 *In re· Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Board Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Board's Rules*, CC Docket No. 98-141, *Memorandum Opinion and Order*, October 6, 1999, at Appendix C, para 59(d) The FCC ordered·

> If an SBC/Ameritech Out-of-Territory Entity fails to satisfy any of the 36 separate requirements for each out-of-territory market on or before the deadlines set forth in Subparagraph c, SBC/Ameritech shall make a one-time contribution of $1.1 million for each missed requirement (up to a total contribution of $39.6 million per market and $1 188 billion if SBC/Ameritech Out-of-Territory Entities fail to satisfy all 36 requirements in all 30 markets) to a fund to provide telecommunications services to underserved areas, groups, or persons

51 *Applications of GTE Corporation and Bell Atlantic Corporation, Description of the Transaction, Public Interest Showing and Related Demonstrations*, CC Docket No 98-184, *Memorandum Opinion and Order*, Rel June 16, 2000, at paras 43-48.

52 Rory J O'Connor, "Looser Reins," *eWeek*, March 26, 2001, "SBC Says It Meets Merger Terms Despite Out-Of-Region Cutbacks," *TR Daily*, March 20, 2001 In an obvious effort to escape the heavy fines that would otherwise apply, on March 5, 2002, SBC represented to the FCC that it is in compliance with its out-of-region entry commitments "for 16 of the required 30 markets," averring that "SBC Telecom, Inc ("SBCT"), the SBC business unit with this responsibility, is offering local exchange service to all business customers and all residential customers throughout the areas in the market that are either (a) within the local

(continued ..)

and Verizon to refrain from active pursuit of an out-of-region CLEC entry strategy suggests either that (a) both companies have concluded that such ventures will not be profitable due to the substantial economic barriers and other hurdles that they would each have to overcome, or (b) the two companies have tacitly adopted a market allocation "agreement" in which each firm stays out of the other's territory. The first explanation clearly indicates the presence of substantial market power on the part of the incumbent LEC, while the second explanation would only be sustainable if entry by other CLECs is not a serious threat.

With market power in the *local* market, a BOC has the ability to extend its local monopoly into the long distance market, unless constrained by regulation.

32. As mentioned earlier, the MFJ prohibited the divested BOCs from offering interLATA long distance services. This *structural remedy* was adopted in order to prevent the BOC local service monopolies from using their monopoly market power in the local services market to block competition in the adjacent long distance market. The specific focus, at that time, was on the matter of *access* by competing long distance carriers to

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52. (continued)
service area of the incumbent RBOC located within the PMSA of the market or (b) within the incumbent service area of a Tier I incumbent LEC (other than SBC/Ameritech) serving at least 10 percent of the access lines in the PMSA ..." Letter dated March 5, 2002 to William F. Caton, Acting Secretary, FCC, from Carlyn D. Moir, Vice President, Federal Regulation, SBC Communications, Inc. SBC's representations to the Commission notwithstanding, the SBC Communications, Inc. website expressly indicates that service is available only in the thirteen in-region (i.e., SWBT, Pacific Bell, Ameritech and SNET) states (see Attachment 3). Moreover, the SBC Communications, Inc. website, www.sbc.com, states that "SBC Communications, Inc. serves 20 of the largest U.S. markets," a figure that clearly does not include the out-of-region markets purportedly being served by SBC Telecom, the SBC out-of-region CLEC business unit. Significantly, the SBC website does not even mention or provide a link to SBC Telecom, the only means by which a consumer would know about SBC's out-of-region local service offerings is by tracking down "SBC Telecom" specifically. Clearly, this "out-of-region" CLEC activity is barely on SBC's radar screen.